

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	DETERMINATION
<b>BEN E. PRICE</b>	:	DTA NOS. 812585
	:	AND 812586
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

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Petitioner, Ben E. Price, 1211 Gulf of Mexico Drive, Longboat Key, Florida 34228-3606, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on May 17, 1995 at 9:15 A.M. In a letter dated December 1, 1995, petitioner was given until December 15, 1995 to serve and file petitioner's brief which commenced the six-month period for issuing this determination. Petitioner filed briefs on September 28, 1995 and December 15, 1995. The Division of Taxation filed a brief on November 13, 1995. Petitioner appeared by McNamee, Lochner, Titus & Williams, P.C. (David J. Wukitsch, Esq., and Vincent L. Valenza, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

***ISSUES***

I. Whether an appraisal of real estate which was submitted by the transferors and the transferee with their real property gains tax questionnaires provided a reasonable apportionment of the consideration to the real property.

II. Whether, if there was not a reasonable apportionment of the consideration, appraisals commissioned by petitioner accurately reflect the fair market value of certain parcels of real property.

III. Whether petitioner is entitled to a refund of real property gains tax.

IV. Whether petitioner has demonstrated that the failure to comply with the provisions of Article 31-B of the Tax Law was due to reasonable cause and not willful neglect.

### ***FINDINGS OF FACT***

1. On July 27, 1989, the Division of Taxation ("Division") received, among other things, real property transfer gains tax transferor and transferee questionnaires pertaining to the sale on April 26, 1989 of a controlling interest in Brad Cable Electronics, Inc. ("Brad Cable") by Ben E. Price (petitioner), Jack B. Craig, Jeffrey A. Hamilton and Roland F. Nobis to Marigold Brad Acquisition Corporation ("Marigold"). At the time of the transaction, Brad Cable owned parcels of real estate located at 1021-27 and 1042-44 State Street, Schenectady, New York.<sup>1</sup> The documents accompanying the questionnaires indicated that Messrs. Price, Hamilton, Craig and Nobis sold 15,600 shares of Brad Cable, which constituted 78 percent of the issued and outstanding shares of Brad Cable, to Marigold pursuant to the terms of a Stock Purchase Agreement dated December 31, 1988 and Amendment Number one to such Stock Purchase Agreement. The documents further indicated that petitioner transferred 39 percent of the total shares, Mr. Craig transferred 17.55 percent of the total shares, Mr. Hamilton transferred 17.55 percent of the total shares and Mr. Nobis transferred 3.9 percent of the total shares. A cover letter to the documents explained that, shortly after the transfer, Marigold was merged into Brad Cable. Further, the various transfers were aggregated by the parties. Therefore, for the sake of convenience, the parties enclosed one check in the amount of \$10,205.45 in payment of the total anticipated tax due as a result of the four transfers to Marigold. The cover letter also stated that there was no agreement between the transferors and the transferee that the transferee would be liable for payment of this tax. Therefore, the payment of the tax by Brad Cable should not be considered additional consideration paid to the transferors.

2. The transferor and transferee questionnaires, which were dated July 21, 1989 by Messrs. Hamilton, Nobis and Craig and July 25, 1989 by petitioner and Marigold, reported that

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<sup>1</sup>The property at 1042-44 State Street, Schenectady, New York is the same property which is referred to infra as 1044-46 State Street, Schenectady, New York.

the foregoing transfer occurred on December 31, 1988. Attachment number one to the transferor and transferee questionnaires provided as follows:

"ATTACHMENT NO. 1

TP 580, Part I

On the date of the transfer, Brad Cable Electronics, Inc.'s total issued and outstanding shares consisted of 20,000 shares of common stock (the 'Shares') which were owned by the following shareholders in the percentages listed opposite their respective names:

<u>Shareholder</u>	<u>Number of Shares Owned</u>	<u>Percentage Ownership</u>
Ben E. Price	10,000	50%
Jack D. Craig	4,500	22.5%
Jeffrey A. Hamilton	4,500	22.5%
Roland F. Nobis	1,000	5%

As set forth in the Stock Purchase Agreement dated as of December 31, 1988 and Amendment No. 1 to such Stock Purchase Agreement (attached to these Questionnaires as Exhibit A), the shareholders of Brad Cable Electronics, Inc. sold 15,600 shares (78% of the total issued and outstanding shares) to Marigold Brad Acquisition Corporation with each individual shareholder transferring the number of shares set forth opposite his name below.

<u>Shareholder</u>	<u>Number of Shares Transferred</u>	<u>Percentage of Total Transferred</u>
Ben E. Price	7,800	39%
Jack D. Craig	3,510	17.55%
Jeffrey A. Hamilton	3,510	17.55%
Roland F. Nobis	780	3.9%"

3. Attachment number 2 to the transferor and transferee questionnaires stated:

"ATTACHMENT NO. 2

TP 580, Schedule B, line 1

As indicated on the appraisal of National Valuations, Inc. dated March 2, 1989, at page 8 (attached hereto as Exhibit B), the total fair market value of Brad Cable Electronics, Inc.'s real property is \$2,535,000. Since a 78 percent interest in Brad Cable Electronics, Inc. was acquired by Marigold Brad Acquisition Corporation, we have determined the total consideration to be paid to the Transferors by the Transferee to be \$1,977,300 (i.e., 78% x \$2,535,000) as required by Section 590.47 of the New York Code of Rules and Regulations. Each shareholder's pro rata share of the total consideration is set forth below opposite his name.

<u>Shareholder</u>	<u>Pro Rata Share of Total Consideration</u>
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Ben E. Price	\$988,650.00 (39% x \$2,535,000)
Jack D. Craig	\$444,892.50 (17.55 x \$2,535,000)
Jeffrey A. Hamilton	\$444,892.50 (17.55% x \$2,535,000)
Roland F. Nobis	\$ 98,865.00 (3.9% x \$2,535,000)"

4. Attachment number three to the transferor and transferee questionnaires provided as follows:

"ATTACHMENT NO. 3

TP 580, Schedule B, line 4

As set forth on Exhibit C, the total original purchase price of Brad Cable Electronics, Inc.'s real property was \$1,233,840. 1021-27 State Street, Schenectady, New York was acquired in 1981 for \$517,392, and 1044-46 State Street, Schenectady, New York was acquired in 1983 for \$716,448. Each shareholder's allocable share of this cost is set forth below opposite his name determined in accordance with Section 590.49(A) of the New York Code or Rules and Regulations.

<u>Shareholder</u>	<u>Allocable share of Total Purchase Price to Acquire Real Property</u>
Ben E. Price	\$481,197.60 (\$1,233,840 x 39%)
Jack D. Craig	\$216,538.92 (\$1,233,840 x 17.55%)
Jeffrey A. Hamilton	\$216,538.92 (\$1,233,840 x 17.55%)
Roland F. Nobis	\$ 48,119.76 (\$1,233,840 x 3.9%)"

5. Attachment number four to the transferor and transferee questionnaires stated:

"ATTACHMENT NO. 4

TP 580, Schedule B, line 6

The total cost of capital improvements allocable to the subject facilities is \$1,170,321. Each shareholder's allocable share of these improvements is the amount set forth opposite his name determined as required by Section 590.49 of the New York Code of Rules and Regulations.

<u>Shareholder</u>	<u>Allocable Shares of Capitol Improvements</u>
Ben E. Price	\$456,425.20 (39% x \$1,170,321)
Jack D. Craig	\$205,391.33 (17.55% x \$1,170,321)
Jeffrey A. Hamilton	\$205,391.33 (17.55% x \$1,170,321)
Roland F. Nobis	\$ 45,642.52 (3.9% x \$1,170,321)"

6. Attachment number 5 to the transferor and transferee questionnaires provided as follows:

"ATTACHMENT NO. 5

TP 580, Schedule B, line 10

Total anticipated tax due as a  
result of transfer of controlling  
interest (78% interest) of Brad  
Cable Electronics, Inc.

\$10,205.45"

7. On its Transferee Questionnaire, Marigold listed the consideration for the transfer as \$1,977,300.00.

8. Petitioner and Messrs. Craig, Hamilton and Nobis included a copy of the "Stock Purchase Agreement Among Marigold Brad Acquisition Corporation, Brad Cable Electronics, Inc. and The Shareholders of Brad Cable Electronics, Inc." dated December 31, 1983 and a copy of "Amendment No. 1 to the Stock Purchase Agreement." Paragraph 6 on page 16 of the Stock Purchase Agreement provided, in part, that:

"BCE [Brad Cable] shall also bear all expenses incurred by any of the Selling Shareholders relating to (A) New York State real property transfer gains taxes and other out-of-pocket expenses relating to the transactions contemplated hereby, and (B) New York State real property transfer gains taxes, if any, arising from the sale by Ben E. Price of fifty percent (50%) of the issued and outstanding capital stock of BCE to Messrs. Jack D. Craig, Jeffrey A. Hamilton and Roland F. Nobis in 1988."

9. Neither the Stock Purchase Agreement nor the amendment to the Stock Purchase Agreement contained an allocation of the purchase price to the real property.

10. Petitioner's allocated 39% of the original purchase price for the 1989 transaction was \$819,633.00.<sup>2</sup>

11. In connection with the filing of the transferor and transferee questionnaires, the Division received a real estate appraisal of 1021-27 State Street and 1044-46 State Street, Schenectady, New York, dated March 2, 1989, prepared by an appraiser employed by National Valuations, Inc. In general, the appraisal shows that National employed a sales comparison approach and an income approach to determine the value of the subject properties. The cost approach was considered inappropriate and was not developed because of the age of the buildings and the difficulty of estimating accrued depreciation.

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<sup>2</sup>This number was stipulated by the parties.

12. Under the sales comparison approach, the National appraiser stated, in part:

"A diligent search of the market uncovered numerous sales of industrial properties in Schenectady. The most recent and considered the most similar for comparison to the subject have been summarized in an attachment to this letter. The sales chosen for further comparison to the subject vary in size from 20,792 square feet to 66,722 square feet of building area and in land area from .43 acres to 5.36 acres. The unadjusted sales prices range from \$9.57 per square foot of building area to \$31.26 per square foot. None of the sales reflects the modernization of the subjects but they are of similar age, design and utility. Appropriate adjustments have been made to reflect the subject improvements as they contribute to value.

"Time adjustments have been made to all of the sales. Adjustments for locational influences, physical characteristics, and utility have also been considered as well as land/building ratio.

"In comparing to [sic] the property at 1021-27 State Street, adjustments were made to reflect the 34 percent modern office area as well as it being heated and air conditioned throughout." (Division's Exhibit "F".)

13. Utilizing the sales comparison approach, the National appraiser concluded that the property located at 1021-27 State Street had a unit value of \$55.00 a square foot of building area excluding the basement resulting in an estimated value of \$1,315,000.00 (rounded). Following the same analysis, he found that the property located at 1044-46 State Street had a unit value of \$40.00 per square foot of building area, excluding the basement, resulting in a value of \$1,162,000.00.

14. Under the income approach the National appraiser stated, in part:

"The subject properties are being appraised as unencumbered by leases since they are presently owner-occupied. In order to arrive at an indication of value from this approach, we have analyzed rental data of similar competitive space throughout the area in order to ascribe a market rent to the subject. Market rent is that rent that a property most likely would provide on the open market at the effective date of the appraisal.

"Discussions with knowledgeable commercial brokers in the Schenectady area indicate that industrial space is leasing for \$3 to \$4 per square foot net with a minimum of office space. Office space similar to the subject is leasing for \$6 to \$7 per square foot net with central air conditioning available. Class A office space is presently leasing for \$10 to \$12 per square foot net of base year taxes with increases passed through to tenants. Class A office space yet to be built is projected at \$13 to \$14 per square foot when brought to market.

"For the purpose of this appraisal, market rent has been estimated on a net basis with the lessor responsible for management and leasing expense and an allowance for unrecoverable expenses and reserves, after an allowance for vacancy and rent loss. In ascribing a net rent to the subject properties, consideration has been given to their size, layout, and overall adaptability to tenants' needs. We have

projected a net rent for 1021-27 State Street of \$7.50 per square foot which results in an annual potential rental income of \$179,215; and \$5.50 per square foot for 1044-46 State Street which results in an annual potential rental income of \$159,775 per square foot of building area. These rental rates reflect single tenant occupancy."

15. The National appraiser regarded a five percent allowance for vacancy and rent loss as reasonable in view of the current market conditions and the nature of the subject property. He also estimated an expense of 7.5% of gross income for "management and leasing, replacement reserves, unrecoverable expenses and contingencies." The foregoing estimates resulted in a gross income of \$170,255.00 and a net operating income of \$157,486.00 for 1021-27 State Street and a gross income \$151,786.00 and a net operating income of \$140,402.00 for 1044-46 State Street. The projected net operating incomes were capitalized at a rate of 11.75% resulting in a value of \$1,340,000.00 (rounded) for 1021-27 State Street and \$1,195,000.00 for 1044-46 State Street.

16. The National appraiser concluded that the income approach was more significant because it is more reflective of investor motivation. He also felt that the comparative sales approach was less persuasive because significant adjustments were required. Therefore, he determined that 1021-27 State Street had a market value, as of the effective date of the appraisal, of \$1,340,000.00 and 1044-46 State Street had a market value, on the same date, of \$1,195,000.00.

17. Upon receipt of the transferor and transferee questionnaires, the Division decided for two reasons to accept, as reported, the consideration for the real property. First, there was an agreement between the transferee and each of the transferors indicating an allocation of the consideration to the property based upon a fair market value of \$2,535,000.00. Second, there was an appraisal by National.

18. In the course of conducting a desk audit, the Division questioned the original purchase price claimed on the transfer of the property. In pursuit of this inquiry, the Division wrote numerous letters. An attachment to a Notice of Determination, which was subsequently issued, summarizes the correspondence as follows:

"Correspondence was sent on June 11, 1990, to Ben Price, Longboat Key, Florida, re-sent on June 29, 1990 and again on July 20, 1990 to Mr. Price at Schenectady, NY.

"Further correspondence was sent to Marigold Brad Acquisition Corp., Schenectady (at the request of Mr. Price) on July 24, 1990; to Mr. Price, Schenectady, on August 29, 1990; to Kathleen M. Franklin of McNamee, Lochner, Titus & Wilhams [sic] PC, on October 31, 1990, to Ron Rabkin of Price Waterhouse, NY, NY on January 11, 1990 and subsequent letters to James Guzewich of Contec [sic] International.

There were also numerous phone calls made."<sup>3</sup>

19. The only documentation which the Division received to substantiate the amount paid was a closing statement for 1021-27 State Street which showed a \$175,000.00 purchase price and \$192.50 in deed stamps. On the basis of the information which it received, the Division adjusted petitioner's original purchase price to \$68,325.08 ( $[\$175,000.00 + \$192.50] \times 39\% = \$68,325.08$ ). The adjustment to petitioner's original purchase price resulted in additional tax due of \$86,929.77.

20. On the basis of the foregoing adjustment, the Division issued a Notice of Determination, dated September 30, 1991, which asserted a deficiency of real property gains tax from petitioner in the amount of \$86,929.77 plus interest in the amount of \$29,237.41 and penalty in the amount of \$31,547.91 for a balance due of \$147,715.09. Notices of determination were also issued to Messrs. Craig, Hamilton and Nobis.

21. In a letter dated April 7, 1992, a Mr. Mark Leeds advised the Division that he represented Messrs. Clark, Hamilton and Nobis. Mr. Leeds requested that the Division provide a copy of all New York State tax forms, filings and attachments filed by the transferors with respect to the transaction under audit.

22. In conjunction with a letter dated April 22, 1992, the Division provided copies of the New York State tax forms filed by Mr. Leeds' clients. The Division noted that the filing

In a letter dated January 2, 1991, the Division was informed that petitioner was unable to comply with the request for additional information since all records were in the possession of the purchaser. It was also noted that the purchaser, Brad Marigold Acquisition Corp. was unable to meet its payment and performance obligations under its loan agreements. When it defaulted, it was restructured and then taken over by Westinghouse Credit Corporation. Westinghouse hired a firm known as ConTec International to handle the audit. It is then stated that ConTec International was asked to provide the Division with the information requested.



was made by Kathleen M. Franklin, Esq., of the firm of McNamee, Lochner, Titus & Williams, P.C. and that Ms. Franklin represented the transferee, Marigold Brad Acquisition Corp. The Division further noted that it had discussions with Mr. Hamilton regarding his acquisition, along with Messrs. Craig and Nobis, of a combined 50% interest approximately a year earlier but that the Division had no documentation to this effect. The Division pointed out that the earlier transaction would be a taxable event. However, Messrs. Hamilton, Craig and Nobis would be allowed a step-up in basis with regard to the subsequent sale if the fair market value of the properties was documented at the time of the acquisition.

23. On May 29, 1992, the Division received a series of documents from Mr. Leeds including a copy of the Brad Cable Stock Purchase Agreement whereby, on March 22, 1988, petitioner transferred a 50% interest in Brad Cable to Jeffrey A. Hamilton and Jack D. Craig. At the time of the transfer, Brad Cable owned parcels of real property located at 1021-27 State Street, Schenectady, New York and 1042-44 State Street, Schenectady, New York. The transfer constituted the sale of a controlling interest in an entity with an interest in real property. Mr. Hamilton and Mr. Craig also agreed that they would each transfer a 2.5% ownership interest to Mr. Roland F. Nobis. The Brad Cable Stock Purchase Agreement did not contain an allocation of the purchase price to the subject properties or other assets.

24. Petitioner's allocated 50% of the original purchase price for the 1988 transaction was \$1,050,812.00.

25. New York State gains tax questionnaires were not filed on this transaction. May 1992 was the first time that anyone from the Division saw the Brad Cable Stock Purchase Agreement.

26. Mr. Leeds also submitted a letter from Robert Cohn Associates, Inc., which stated that for the period March 1988 through December 1988 the area of the subject properties was on the decline. As a result, there was a reduction in property values.

27. On the basis of the information submitted by Mr. Leeds, the Division determined that Messrs. Hamilton, Craig and Nobis had adequately demonstrated that the fair market value

of the subject properties at the time they acquired an interest in Brad Cable in March 1988 was substantially the same as the fair market value of the property when they transferred their interest in April 1989. Accordingly, the Division cancelled the assessments against Messrs. Hamilton, Craig and Nobis on the basis that the taxpayers were entitled to a step-up in their original purchase price.

28. The Division issued a Notice of Determination, dated August 7, 1992, to petitioner which asserted a deficiency of real property gains tax arising from his unreported transaction in 1988 to Messrs. Hamilton and Craig. The notice stated that tax was due in the amount of \$111,750.00 plus interest in the amount of \$60,358.04 and penalty in the amount of \$39,112.50 for a balance due of \$211,220.54. In determining the amount of tax due, the amount of the consideration that was used to step-up the original purchase price for Messrs. Hamilton, Craig and Nobis was also used to calculate the gain on the prior unreported transaction. Further, on the basis of a tax map that showed that the subject properties were on opposite sides of the street, the Division determined that the subject properties were contiguous or adjacent.

29. The asserted deficiencies of tax were substantially reduced following the receipt of additional information and documentation with respect to petitioner's original purchase price. For the transaction in 1988, the Division is currently seeking real property gains tax in the amount of \$21,669.00 plus penalty and interest computed at the applicable rate. For the transaction in 1989, the Division is currently seeking real property gains tax in the amount of \$6,696.55 plus penalty and interest computed at the applicable rate. In determining the amount of tax asserted to be due for the year 1989, the Division took into account the payment of \$10,250.00 which was paid with respect to the 1989 transaction.

30. In order to challenge the valuation relied upon by the Division, petitioner presented testimony and documents prepared by a Mr. William J. McEvoy who conducted appraisals on 1021-27 State Street and 1042-44<sup>4</sup> State Street. In conducting these appraisals, it was Mr. McEvoy's goal to determine the fair market value of the properties as of March 22, 1988 and

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<sup>4</sup>As noted, this is the same property which the National appraiser referred to as 1044-1046 State Street, Schenectady, New York.

April 26, 1989. In his appraisals of the subject properties, Mr. McEvoy defined the term market value as follows:

"MARKET VALUE DEFINED

"Market Value is defined as the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

1. buyer and seller are typically motivated;
2. both parties are well informed or well advised, and acting in what they consider their best interests;
3. a reasonable time is allowed for exposure in the open market;
4. payment is made in terms of cash in United States dollars or in terms of financial arrangements comparable thereto; and
5. the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale." (Petitioner's Exhibit "2".)

31. In order to assess the value of the property located at 1021-27 State Street, Mr. McEvoy first employed a reproduction cost approach. The first step in this approach was to estimate the value of the underlying land which was accomplished through an analysis of comparable sales. Mr. McEvoy found four comparable properties, which are set forth in his report, and made adjustments for variations. After completing the process, Mr. McEvoy determined that the land had a value of \$1.85 a square foot which resulted in a value of \$63,000.00.

32. Mr. McEvoy next utilized a manual published by the Marshall Valuation Service ("Marshall Service"), which is an accepted resource in the appraisal industry. Using data from this manual, Mr. McEvoy derived a square-foot cost to reproduce the property. Since the figures which Mr. McEvoy was using were from a 1994 manual, the figures had to be adjusted back to 1988. This was accomplished using a factor which the Marshall Service provided. Mr.

McEvoy concluded the reproduction cost of the property at 1021-27 State Street, as of March 22, 1988, was \$1,211,910.00.

33. Mr. McEvoy's next step was to add entrepreneurial profit which is the profit which a developer would expect beyond the cost of developing the property. He concluded that 15 percent was appropriate because "[t]imes were good in Schenectady at that time" (tr. p. 56).

34. Mr. McEvoy subtracted the depreciation from the reproduction cost and found that the value of the building on March 22, 1988 was \$571,415.00. This amount was increased by site improvements and the value of the land resulting in a reproduction cost of \$637,265.00.

35. In Mr. McEvoy's opinion, the reproduction cost approach results in a high limit because depreciation is usually a subjective value based on an appraiser's experience and observation.

36. Mr. McEvoy also appraised property at 1021-27 State Street utilizing a comparable sales approach. In accordance with this approach, Mr. McEvoy conducted a search and found four sales which he regarded as sufficiently similar to permit a valid comparison.

37. After locating the four properties, which are described in the appraisal report, Mr. McEvoy analyzed the parcels, compared them to the subject property, made adjustments for differences and derived an estimate for value per square foot of the subject premises. Mr. McEvoy also inspected and photographed the properties and conferred with the parties involved with the sales.

38. The Appraisal Institute publishes standards that require an appraiser to prepare a chart or comparison analysis of the similar properties when utilizing the comparable sales approach. Mr. McEvoy's appraisal follows these standards. An appraisal that does not have a comparison analysis is considered a substandard analysis.

39. Using the comparable sales approach, Mr. McEvoy found a square-foot price of \$25.50. On the basis of this information, Mr. McEvoy determined that the market value of 1021-27 State Street as of March 22, 1989 was \$609,000.00.

40. Mr. McEvoy next conducted an income analysis of the subject property. In this method, one finds similar properties that have been leased. The leases are compared to the subject property and adjustments are made for differences in order to arrive at a square foot rental of the subject property.

41. Mr. McEvoy examined three leases and compared them to 1021-27 State Street in order to determine the market rent. The lease condition for the subject premises was based on a five-year lease term with one option to renew for a term of five years. Mr. McEvoy also proceeded on the premise that the tenant was responsible for taxes, insurance, utilities and general maintenance. As a result of this analysis, Mr. McEvoy concluded that a rental of \$3.15 was indicated for March 22, 1988.

42. The next step in the income approach is to develop an income and expense statement. This is accomplished by multiplying the rental income by the square footage of the building. The product is then reduced by an allowance for vacancy, credit loss, management expenses and a reserve. In this case, the result was a net operating income of \$62,323.00.

43. Mr. McEvoy proceeded to develop a capitalization rate which was made up of four factors: mortgage financing that would be applied to the building, an allowance for investors to receive a yield on their equity, an allowance for the increase of equity over the term of the mortgage and an allowance for the appreciation or depreciation of the property over the term of the mortgage. Utilizing these factors, Mr. McEvoy arrived at a capitalization rate of 10.13. He then multiplied the capitalization rate by the net income resulting in a market value of \$615,000.00 as of March 22, 1988.

44. Since the income analysis applied to only one year, Mr. McEvoy performed a discounted cash flow analysis in which the first year's expenses are extended over a six-year period to determine a selling price at the end of the fifth year. The net operating income together with the selling price is discounted to the present value at a rate which would be attractive to investors. Mr. McEvoy found that the annual net income plus the selling price less the discounted selling cost resulted in a value estimate of \$613,000.00 as of March 22, 1988.

45. Mr. McEvoy examined the foregoing results and selected the one that he felt was the most plausible for the type of building and the economy of the area. In Mr. McEvoy's opinion, the market value of 1021-27 State Street as of March 22, 1988 was \$612,000.00.

46. Mr. McEvoy also assessed the value of the property at 1021-27 State Street as of April 26, 1989 using the same four approaches. The results of Mr. McEvoy's analysis were: reproduction cost - \$641,000.00; comparable sales analysis - \$621,000.00; income analysis - \$625,000.00; and discounted cash flow - \$624,000.00. Mr. McEvoy's final opinion of value for 1021-27 State Street, as of April 26, 1989, was \$622,000.00.

47. At the request of petitioner, Mr. McEvoy made an appraisal of the property at 1042-44 State Street with valuation dates of March 22, 1988 and April 26, 1989. In order to determine the market value of 1042-44 State Street, Mr. McEvoy used the same approaches to value that were used at 1021-27 State Street.

48. Under the reproduction cost approach, the value of the land at 1042-44 State Street as of March 22, 1988 was \$73,000.00. The reproduction cost of a new building as of March 22, 1988 was \$1,186,669.00 and the value assigned to depreciation was \$709,628.00. On the basis of the foregoing, Mr. McEvoy opined that the market value of 1042-44 State Street as of March 1988 under the reproduction cost approach to value was \$731,241.00.

49. Mr. McEvoy performed a comparable sales analysis using four comparable sales and arrived at an estimate of value of \$24.50 a square-foot for 1042-44 State Street, as of March 22, 1988, resulting in a market value of \$716,000.00.

50. Mr. McEvoy next prepared an income analysis and determined that the rental value was \$3.10 a square-foot for 1042-44 State Street in 1988. The next step was to project income and expenses for the year which resulted in a projected income of \$73,376.00. A capitalization rate of 10.13 was then employed resulting in a market value of 1042-44 State Street, on March 22, 1988 of \$724,000.00.

51. Lastly, Mr. McEvoy performed a discounted cash flow analysis which resulted in a value of \$724,000.00 on March 22, 1988.

52. Mr. McEvoy reconciled the four values and concluded that the market value of 1042-44 State Street as of March 22, 1988 was \$720,000.00.

53. Using the same four approaches to value, Mr. McEvoy assessed the value of 1042-44 State Street as of April 26, 1989 with the following results: reproduction cost - \$739,000.00; comparable sales analysis - \$745,000.00; income analysis - \$736,000.00; and discounted cash flow analysis - \$737,000.00. Mr. McEvoy's final opinion of value of 1042-44 State Street as of April 26, 1989, was \$740,000.00. As support for the final figure, Mr. McEvoy relied most heavily on the comparable sales analysis and income analysis as well as the support from the discounted cash flow analysis.

54. Mr. McEvoy conducted other appraisals of the subject properties. The results of the prior appraisals are consistent with the results reached herein.

55. Testifying as an expert, it is Mr. McEvoy's opinion that the opinion of value submitted with the gains tax questionnaires did not qualify as an appraisal because the conclusions were unsupported. With respect to the appraisal of 1021-27 State Street, Mr. McEvoy notes that the appraiser from National reached a value of \$55.00 a square-foot using comparable properties which ranged in value from \$9.57 a square-foot to \$31.26 a square-foot. It was difficult for Mr. McEvoy to determine how the appraiser from National reached a value of \$55.00 a square foot. Similarly, in Mr. McEvoy's opinion, there is not enough data in the National appraisal report to determine a value under the comparable sales approach. In the income analysis, the appraiser from National concluded, on the basis of discussions with "knowledgeable commercial brokers", that similar office space was leasing for \$6.00 to \$7.00 a square-foot. However, the National appraiser did not say who the brokers were. In Mr. McEvoy's opinion, there was no support or justification for an amount of \$7.50 a square-foot and its use inflated the opinion of value. At the hearing, Mr. McEvoy also explained that the same valuation problems appear in the appraisal of 1042-44 State Street as were present in the appraisal of 1021-27 State Street. That is, the appraisal did not have sufficient data to reach a value under the comparable sales approach. Therefore, in Mr. McEvoy's opinion, the value

assigned by the National appraiser to 1042-44 State Street for March 1989 was completely unsupported. Mr. McEvoy also opined that the author of the report from National would be subject to disciplinary action if the report were presented to a panel of the American Institute of Real Estate Appraisers.

56. In accordance with State Administrative Procedure Act § 306(1), the Division's proposed findings of fact have been accepted and incorporated herein.

***SUMMARY OF THE PARTIES' POSITIONS***

57. Initially, petitioner argues that 78% of the fair market value of the real property owned by Brad Cable on April 26, 1989 was less than 78% of the original purchase price. It is submitted that, as a result, no tax is due since there is no gain. In support of this position, petitioner states that his use of the National appraisal as a basis for determining consideration for this Real Property Gains Tax Questionnaire does not preclude him from contesting the National appraisal and the reported consideration. Petitioner posits that his filing of the National appraisal with his gains tax returns causes him to bear the burden of proof of establishing that the National appraisal was unreasonable and that reliance on the appraisal resulted in an unreasonable allocation of the purchase price for Brad Cable's stock to the subject properties.

Petitioner further contends that neither the Stock Purchase Agreement nor the Amendment to the Stock Purchase Agreement for the April 26, 1989 sale provided for any allocation of the purchase price to the subject properties. Rather, the only basis for the consideration reported on the gains tax returns was the National appraisal.

Petitioner submits that the income approach of the National appraisal is deficient. The appraiser did not analyze the comparable properties but instead relied on commercial brokers without identifying who these brokers were or their qualifications or experience. Further, the National appraisal stated that adjustments were made to the rents. However, he did not provide any explication of how the adjustments were made. Petitioner submits that the result is a totally speculative determination of the fair market value.



With respect to the sales comparison approach, petitioner argues that National's valuation is invalid because the appraiser did not provide his analysis of the adjustments made to the sales price of the comparable properties to determine the fair market of the subject properties.

Petitioner submits that the deficiencies in the National appraisal result in a failure to comply with the standards of the New York State Board of Real Estate Appraisal Uniform Standards of Professional Appraisal Practice.

Petitioner contends that the fair market value of the two subject properties as of April 26, 1989 was \$1,362,000.00 and that subtracting 78% of the subject properties' original purchase price from the fair market value of the subject properties results in a loss. Therefore, there is no gains tax due with respect to such transaction.

58. Petitioner next argues that 50% of the fair market value of the real property owned by Brad Cable on March 22, 1988 was less than \$1,000,000.00 and, therefore, petitioner is entitled to an exemption from gains tax. Petitioner submits that the determination of the consideration received must be based on the apportioned fair market value of the properties and the only appraisal in the record which provides a determination of the fair market value of the subject properties on March 22, 1988 is the appraisal of Mr. McEvoy. It is petitioner's position that the letter from Robert Cohn Associates, Inc. (Finding of Fact "26") does not provide any support for the conclusions stated. It is also submitted that the letter is untimely since it compares December 1988 values to March 1988 values. Petitioner notes that the National appraisal is as of March 1989 not December 1988 and the letter from Robert Cohn Associates, Inc. does not comment on market conditions between March 1988 and March 1989.

59. Petitioner's last argument is that he has established that his noncompliance with the Tax Law was due to reasonable cause and therefore he is entitled to a waiver of the penalties assessed. With respect to the 1989 transaction, petitioner argues that the original purchase price was reduced on audit because of his inability to substantiate the original purchase price set forth on his gains tax return. Petitioner submits that he attempted to provide such information but since the transaction was a stock sale the information was no longer in his control. According

to petitioner, the records were transferred to successive corporations making it extremely difficult to obtain the necessary documents. With respect to the 1988 transaction, petitioner contends that he reasonably believed that the fair market value of the subject property on March 22, 1988 was below \$1,000,000.00.

60. In response to the foregoing, the Division argues that petitioner bears the burden of proving by clear and convincing evidence that the Division improperly determined his consideration for the 1988 and 1989 transfers. The Division maintains that it properly determined that the consideration for the 1989 transaction was the consideration reported by all of the parties to the transaction in their gains tax filings. It is noted that the transferor and transferee questionnaires report the consideration for the transaction as \$1,977,300.00 and that all of the parties used the National appraisal and agreed on an allocation of \$1,977,300.00 to the real property based on a total real property value of \$2,535,000.00. The Division submits that the parties established the "consideration" for the transfer within the meaning of Tax Law § 1440(1).

The Division further submits that the credibility of petitioner's attack on the National appraisal is undermined by his failure to appear at the hearing and subject himself to cross-examination on the circumstances of the April 1989 transfer and why the consideration agreed to by the parties does not represent the "price paid". The Division contends that the credibility of petitioner's attack on the National valuation appraisal is also impaired by the fact that he and the other parties to the transaction utilized it in their gains tax filings. Relying upon Matter of Shareholders of Beekman Country Club (Tax Appeals Tribunal, April 16, 1992, confirmed Matter of Beekman Country Club v. Wetzler, 199 AD2d 640, 604 NYS2d 989) and Matter of Bridgehampton Investors Corp. (Tax Appeals Tribunal, August 11, 1988), the Division posits that case law compels the rejection of the appraisals relied upon by petitioner.

61. The Division next argues that it properly determined that the consideration for the 1988 transaction was 50% of \$2,535,000.00. First, the Division notes that even if the values advanced by petitioner are accepted, the consideration for the March 1988 transfer and the April

1989 transfer is subject to aggregation and, as a result, the total consideration exceeds \$1,000,000.00. The Division explains the since there was no filing for the March 1988 transaction and the April 1989 transaction occurred only one year later, the Division used the National appraisal to determine the consideration for the March 1988 transfer. The Division contends that its determination that the consideration for the March 1988 transaction was \$1,267,500.00 was rational since the parties to the April 1989 transfer allocated the consideration based on the March 1989 National appraisal and since real estate values had not changed between March 1988 and March 1989. After reciting the amounts paid for the transfer in 1988, the Division posits that the appraisals offered by Mr. McEvoy cannot be compared to the value of the assets which are not real property to determine whether it fairly represents the "price paid" for the real property. According to the Division, it would be an anomalous result if petitioner, having agreed to an apportionment in April 1989 based on a \$2,535,000.00 value for the real property, were able to avoid that value on a transaction which occurred a year earlier and, as a result, obtain an advantage by not entering into an apportionment with the transferees.

62. The Division maintains that petitioner is not entitled to a refund of the gains tax paid on the April 1989 stock transfer. Assuming for the sake of argument that there was an overpayment, the Division posits that petitioner has not demonstrated that a refund claim was filed within two years of the date the tax was paid.

63. The Division's last argument is that petitioner has not demonstrated that his failure to comply with the filing and payment provisions of the Gains Tax Law was due to reasonable cause and not willful neglect. With respect to the transaction in 1988, the Division submits that there is no proof to support the argument that petitioner reasonably believed that the apportioned fair market value of the subject property of March 22, 1988 was below \$1,000,000.00. The Division notes that it is undisputed that petitioner failed to report the March 1988 transfer and, since petitioner did not testify, there is no evidence concerning the gains tax ramifications of the March 1988 transfer. Referring to the stock purchase agreement, the Division contends that the parties were aware that the transaction might be subject to gains

tax but declined to report it. With respect to the 1989 transaction, the Division notes that the gains tax questionnaires were filed three months after the transfer and this delay went totally unexplained. The Division also submits that the claims regarding the inability to gather records needs to be elaborated upon.

64. In a reply brief, petitioner argues that he has to prove only that the appraisal by Mr. McEvoy more accurately reflects the value of the property. Petitioner also argues that the Division is incorrect in its assertion that the parties to the 1989 transaction agreed upon an allocation of the consideration to the real property. Petitioner notes that neither the Stock Purchase Agreement nor the Amendment to the Stock Purchase Agreement allocates part of the consideration to the real estate. According to petitioner, the questionnaires filed by the parties to the transaction were not an agreement but merely recitals of value set forth in the National appraisal. It is submitted that, even if there was an agreement, it would not be determinative of value since it does not reflect the fair market value of the real property.

Petitioner contends that his failure to appear at the hearing is irrelevant since he is not an expert in real property valuation. Rather, it is submitted that the Division is relying on unsubstantiated testimony.

Petitioner next argues that he may challenge the 1989 appraisal and that he is not estopped from establishing the fair market value of the real property. Nevertheless, petitioner does not dispute that he has the burden of proof.

Petitioner submits that the consideration for the 1988 and 1989 transactions is not aggregated for purposes of determining the amount of gain, if any, which is taxable. According to petitioner, 20 NYCRR 590.45(d), as effective in 1988, required aggregation of the acquisition of interests in a corporation by the same shareholder within a three-year period to determine if an acquisition of a controlling interest had occurred. Petitioner then notes that the 1988 and 1989 transfers were to different and unrelated shareholders. Petitioner also points out that it has been stipulated that each of these transactions involved the sale of a controlling interest.

Lastly, petitioner submits that the Division may not resort to a residual valuation method to determine the value of the property and that only the fair market value of the real property may be considered. Petitioner contends that he has provided an appraisal to establish its fair market value.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1441 imposes a tax at the rate of 10% on gains derived from the transfer of real property within New York State. Section 1440(7) defines a "transfer of real property" to mean:

"the transfer or transfers of any interest in real property by any method, including but not limited to sale . . . or acquisition of a controlling interest in any entity with an interest in real property."

Tax Law § 1440(3) defines "gain" as "the difference between the consideration for the transfer of real property and the original purchase price of such property . . . ." The term "original purchase price" is defined as, generally, the consideration paid or required to be paid by the transferor to acquire the interest in real property, plus the cost of certain improvements and customary expenses as set forth in the statute (Tax Law § 1440[5][a]). The threshold level at which this tax first applies is reached when the consideration for the property transferred equals or exceeds \$1,000,000.00 (Tax Law § 1443[1]).

B. The term "consideration is defined as "the price paid or required to be paid for real property or any interest therein . . ." (Tax Law § 1440[1][a]). Section 1440(1)(c) and (2) further provide that:

"In the case of a transfer of a controlling interest in an entity with an interest in real property, there shall be an apportionment of the fair market value of the interest in real property to the controlling interest for the purpose of ascertaining the consideration for the transfer of such controlling interest.

\* \* \*

"'Controlling interest' means (i) in the case of a corporation, either fifty percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation . . . ."

20 NYCRR former 590.47 provided in part as follows:

"Consideration

"(a) Question: Is the price paid for the ownership interest in an entity the consideration for a controlling interest used to calculate gain?

"Answer: Generally, no. Section 1440(1) of the Tax Law states that: ' . . . there shall be an apportionment of the fair market value of the interest in real property to the controlling interest to ascertain the consideration for the controlling interest'.

"Example: A corporation's only asset is a \$4 million fair market value piece of property. If 100 percent of the stock is purchased, the consideration is \$4 million (\$4,000,000.00 x 100 percent). If a 50 percent interest were acquired, only \$2 million consideration is used to calculate gain.

"(b) Question: How is fair market value determined?

"Answer: Generally, by appraisal. It is the amount a willing buyer would pay a willing seller for the real property . . . ."

C. In essence, it is petitioner's position that his valuation should be accepted because he has established that it more accurately reflects the fair market value of the property. The Division has responded by asserting that petitioner is bound by his prior filing which was agreed to by each of the parties.

D. In Matter of Shareholders of Beekman Country Club (Tax Appeals Tribunal, April 16, 1992, confirmed, Matter of Beekman Country Club v. Wetzler, 199 AD2d 640, 604 NYS2d 989), the Tax Appeals Tribunal concluded that, in the absence of a showing of unreasonableness, an apportionment agreement between the transferors and the transferee satisfied the provisions of Tax Law § 1440(1)(c). Before one may consider an appraisal of fair market value which would alter the terms of an apportionment agreement the party challenging the agreement must first establish that the apportionment is unreasonable. In Beekman, the Tribunal concluded that the petitioners had not established that the allocation agreement was unreasonable through the introduction of a new appraisal because the new appraisal did not follow an acceptable valuation method for determining the fair market value of the property. Namely, it did not reflect "the price a willing buyer would pay a willing seller." (Matter of Shareholders of Beekman Country Club, supra).

In the proceeding which followed, the determination of the Tax Appeals Tribunal was confirmed (Matter of Shareholders of Beekman Country Club v. Wetzler, 199 AD2d 640, 604 NYS2d 989). The Court noted that the purchasers never acquiesced in the revaluation of the real property and that an appraisal is not required in all instances. The Court concluded that "in the absence of an adequate showing that the allocation agreement is unreasonable or that the appraisal more accurately reflects the fair market value of the property, the Tribunal's determination should be upheld." (Matter of Shareholders of Beekman Country Club v. Wetzler, supra).

E. First, contrary to petitioners' position, the evidence in the record shows that the parties to the 1989 transaction agreed to an allocation of the consideration to the real property. It is recognized that neither the Stock Purchase Agreement nor the Amendment to the Stock Purchase Agreement allocated part of the consideration to the real estate. However, as pointed out by the Tribunal in Matter of Shareholders of Beekman Country Club (supra), Tax Law § 1447(1) requires both the transferor and transferee to file questionnaires which are subsequently used by the Division to determine the tentative assessment of the tax due. Considering the fact that the transferor and transferee questionnaires were filed together, that the parties relied on the same appraisal and that they reported the same value as the consideration for the real estate, there is ample evidence in the record to conclude that the parties to the transaction in 1989 reached an agreement as to the value to be accorded to the real estate in 1989.

F. Since the parties reached an agreement as to the value to be accorded the real estate in 1989, petitioner bears an initial burden of establishing that the value attributed to the real property by the parties to the transaction was unreasonable. It is noted that this is a substantial burden. Recently, the Tribunal recognized the potentially binding effect that a taxpayer's statements may have on his tax liability (see, Matter of Philip Morris Companies, Inc., Tax Appeals Tribunal, November 2, 1995).

G. In considering the 1989 appraisals from National and Mr. McEvoy, one notices that there is a very significant difference in the respective values accorded the properties. As of April 1989, the National appraisal valued 1021-27 State Street at \$1,340,000.00 and it valued 1042-44 State Street at \$1,195,000.00 for a total value for both properties of \$2,535,000.00. In contrast, Mr. McEvoy placed a value of \$622,000.00 on 1021-27 State Street and a value of \$740,000.00 on 1042-44 State Street for a total value of both properties of \$1,362,000.00. This is a difference of 46.27% between the total amounts of the respective appraisals.

H. Petitioner has correctly pointed out that there are serious difficulties with the National appraisal. For example, for the sales comparison approach, the National appraiser used the sales of six industrial buildings with sales prices ranging from \$9.57 a square foot to \$31.26 a square-foot. After making unexplained adjustments for differences between the properties, the National appraiser found that the property at 1021-27 State Street had a value of \$55.00 a square foot, excluding the basement, resulting in a value of \$1,315,000.00. Excluding the basement, the National appraiser attributed a value of \$40.00 a square-foot to the property at 1042-44 State Street resulting in a value of \$1,162,000.00. Although in each case the National appraiser stated that adjustments were made to reflect improvements, time, location influences, physical characteristics, utility and land/building ratio, there is no indication of the amount of the adjustments within each category or a justification for the estimated value.

With respect to the income approach, the National appraiser relied on unidentified brokers in the Schenectady area who indicated that industrial space was leasing for \$3.00 to \$4.00 a square-foot with a minimum of office space. Office space similar to the subject properties was leasing for \$6.00 to \$7.00 a square-foot net with certain utilities available. Without any explanation, the National appraiser selected a rental of \$7.50 a square foot on a net basis for the property at 1021-27 State Street and a square-foot rental of \$5.50 for the property at 1042-44 State Street.<sup>5</sup>

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<sup>5</sup>There is a discussion of class A office space which is projected to be \$13.00 to \$14.00 a square foot. However, there is no discussion of how the class A office space pertains to the subject properties.



In contrast to the foregoing, petitioner, through Mr. McEvoy, presented two appraisals which were fully documented. Unlike the appraisals in Matter of Bridgehampton Investors Corp. (supra), or Matter of Beekman Country Club, Inc. (supra), Mr. McEvoy sought an amount for market value which is consistent with the definition of fair market value adopted by the Tax Appeals Tribunal. That is, "the price at which a willing seller and a willing buyer will trade." (Matter of Bridgehampton Investors Corp., Tax Appeals Tribunal, August 11, 1988, quoting Black's Law Dictionary 717 [4th ed 1957].) Additional credence for Mr. McEvoy's analysis can be found by the fact that several years earlier he performed an appraisal which resulted in comparable findings to those presented herein. The conclusion drawn from the foregoing is that the unsupported National appraisal resulted in an unreasonably high allocation of value to the real property and that the appraisal of Mr. McEvoy more accurately reflects the fair market value of the real property.<sup>6</sup>

I. The next question is what value should be placed upon the real property with respect to the transaction which occurred in 1988. The Division relied upon the National appraisal and a letter from a firm of realtors for the position that the values had been stable. Petitioner, on the other hand, relies upon another appraisal from Mr. McEvoy which values the property as of March 22, 1988.

J. First, contrary to petitioner's argument, an appraisal is not required in all instances (Matter of Beekman Country Club v. Wetzler, supra). However, having concluded that the National appraisal did not reflect the fair market value of the properties in 1989, it follows that it may not be used to determine the value of the real property in 1988. Since Mr. McEvoy's valuation of the real property in 1988 is the only acceptable valuation in the record, his appraisal of the property for 1988 is accepted.

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<sup>6</sup>In reaching this conclusion, no consideration has been given to the standards of the New York State Board of Real Estate Appraisal Uniform Standards of Appraisal Practice because the issue is not whether said standards have been satisfied but whether the allocation agreement was unreasonable or whether the new appraisal is a better reflection of the fair market value of the property (Matter of the Shareholders of Beekman Country Club v. Wetzler, supra).

K. The impact of accepting Mr. McEvoy's appraisals of value is the next consideration. Relying upon Matter of Harris (Tax Appeals Tribunal, December 30, 1993) and 20 NYCRR former 590.45(d), the Division contends that, even if the values proposed by petitioner for the real property are accepted, the consideration for the March 1988 transfer and the April 1989 transfer are subject to aggregation and, as a result, the consideration for petitioner's transfers exceeds \$1,000,000.00.

In Matter of Harris (supra), the Tax Appeals Tribunal concluded that when there are a series of transfers by different transferors, it is the intent of the transferee which determines whether the transfers will be aggregated to reach the threshold for imposition of tax. Since there was no information about the intent of the transferees, the Tax Appeals Tribunal concluded that the taxpayer had not established that the transferees were not acting in concert in acquiring 100% of the stock and therefore, the sales were properly aggregated.

The regulation relied upon by the Division provides as follows:

"(d) Question: If a shareholder acquires a 50-percent interest in a corporation and gains tax is paid on the transfer, and one year later the same shareholder acquires an additional 20 percent, is there a second acquisition of a controlling interest?

"Answer: Yes. The interests acquired after March 28, 1983 are added together in determining whether an acquisition of a controlling interest has occurred. No acquisition of stock will be added to another acquisition of stock if they occur more than three years apart, unless the acquisitions were so timed as part of a plan to avoid the gains tax. An example of this would be if T acquired 80 percent of the stock and simultaneously contracted for the purchase of the remaining 20 percent in three years and one day." (20 NYCRR former 590.45[d].)

L. The Division's reliance upon the foregoing authorities is misplaced. The regulation cited by the Division requires the aggregation of the acquisition of interests in a corporation by the same shareholder within a three-year period to determine if an acquisition of a controlling interest had occurred. Similarly, in Matter of Harris (supra), the focus was on the acquisition of a controlling interest by the same transferees who were believed to be acting in concert. In this case, the 1988 transfer was between petitioner as seller and Messrs. Hamilton and Craig as buyers. The 1989 transaction was between petitioner and Messrs. Hamilton, Craig and Nobis as sellers and Marigold as buyer. Thus, as noted by petitioner, the 1988 and 1989 transfers were to

different and unrelated shareholders and the Division never asserted that the transferees were acting in concert. Accordingly, the authority relied upon by the Division is inapposite and the Division's argument that the two transfers should be aggregated is rejected.

M. As explained in petitioner's brief, the evidence establishes that the fair market values of the subject properties as of April 26, 1989 were as follows:

1021-1027 State Street	\$ 622,000.00
1042-1044 State Street	\$ <u>740,000.00</u>
Total fair market value	\$ 1,362,000.00

The parties stipulated that petitioner's allocated 39% interest of the original purchase price for the transaction in 1989 was \$819,633.00. Therefore, the original purchase price of the subject properties on April 26, 1989 was \$2,101,623.08. It follows that 78% of the subject properties on April 26, 1989, which represents the original purchase price, was \$1,639,265.99.

The calculation of gain or loss proceeds as follows:

Fair market value (\$1,362,000.00 x 78%)	\$1,062,360.00
Original purchase price	<u>\$1,639,265.99</u>
Loss	(\$ 576,905.99)

Since the transaction in 1989 resulted in a loss, there is no gains tax due on said transfer.

The evidence further establishes that the fair market value of the subject properties, as of March 22, 1988, was as follows:

1021-1027 State Street	\$ 612,000.00
1042-1044 State Street	\$ <u>720,000.00</u>
Total fair market value	\$1,332,000.00

Apportioning the fair market value of the \$1,332,000.00 to the 50% interest which was conveyed results in an amount of \$666,000.00. Since this is below the \$1,000,000.00 threshold for the imposition of tax, there is no gains tax due on the transfer in 1988.

N. In reaching the foregoing conclusion, it is recognized that petitioner's testimony would have been helpful to a resolution of the issue of whether there was an agreement between the parties on an allocation of the purchase price. However, the Division has no reason to complain on this point because this question was resolved in favor of the Division. Moreover, as noted earlier, the next question was whether there was evidence that "the

allocation agreement is unreasonable or that the appraisal more accurately reflects the fair market value of the property." (Matter of Beekman Country Club v. Wetzler, supra.) In order to support this point, petitioner presented the testimony of an appraiser. The Division has not presented any reason for believing that petitioner is in a position to offer testimony on this point.

O. The Division argues that if there was an overpayment of tax, petitioner is not entitled to a refund because he has not demonstrated that a refund claim was filed within two years of the date the tax was paid. This argument has merit. As noted by the Tax Appeals Tribunal in Matter of United States Life Insurance Company in the City of New York (Tax Appeals Tribunal, October 5, 1995), Tax Law § 1444(1) provides authority to review notices of determination issued by the Division. Nevertheless, Tax Law § 1444(1) does not permit one to go beyond the notice and determine that the taxpayer made an overpayment of tax and is entitled to a refund. Accordingly, a refund is not authorized by the foregoing conclusions.

P. While the issue of penalties is now moot, attention will be given to the Division's imposition of penalties as if the notices had been sustained (see, United States Life Insurance Company in the City of New York, Tax Appeals Tribunal, March 24, 1994 [where the Tribunal explained that all issues raised by the parties should be addressed in a determination]).

Q. Tax Law former § 1446(2)(a) provided, in pertinent part, as follows:

"Any transferor failing to file a return or to pay any tax within the time required by this article shall be subject to a penalty of ten per centum of the amount of tax due plus an interest penalty of two per centum of such amount . . . . If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit, abate or waive all of such penalty and such interest penalty."

R. Petitioner's argument regarding the inability to obtain records is unpersuasive. Tax Law § 1448(3) provides that every transferor who is subject to tax "is required to keep complete records of acquisitions and transfers of interests in real property and controlling interest as defined in . . . [Article 31-B of the Tax Law]." This section further provides that such records shall be made available for inspection and examination by authorized personnel and, in general, shall be preserved for a period of three years. Accordingly, petitioner's inability to produce the

requested records of the 1989 transaction warrants the imposition of penalty as it was his obligation to produce the records upon request. Petitioner has also failed to provide reasonable cause for the failure to timely file the gains tax returns for the 1989 transaction.

An additional reason for not cancelling penalties arises from the fact that petitioner failed to report the 1988 transaction. This conduct contravenes the pre-transfer audit procedure contemplated by Tax Law § 1447(2) and the requirement of 20 NYCRR 590.69 which directs that tax shall be paid no later than the 15th day following the date of transfer.

S. The petition of Ben E. Price is granted and the notices of determination, dated September 30, 1991 and August 7, 1992, are cancelled.

DATED: Troy, New York  
April 18, 1996

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE